FILE COPY

Office - Supreme Court, U. S.
MAR 6 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of HONORABLE W. W. TRENT, President, MARY H. DAVISSON, THELMA B. LOUDIN, RAYMOND BREWSTER, LYDIA C. HERN, L. V. THOMPSON, and MRS. DOUGLAS W. BROWN, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said STATE BOARD OF EDUCATION,

Defendants-Appellants,

vs.

WALTER BARNETTE, PAUL STULL, and LUCY McCLURE,

Plaintiffs-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

WILLIAM G. FENNELL,
OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
Of the New York Bar,

HOWARD B. LEE,
Of the West Virginia Bar,
Attorneys for the American Civil Liberties Union, Amicus Curiae

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-7245

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
THE ISSUE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
POINT I—The decision of this Court in Minersville School District *v.* Gobitis (310 U. S. 586) should be reversed	8–10
POINT II—Enforcement of the regulation of the State Board, in so far as persons holding a religious belief and doctrine against giving the flag salute are concerned, deprives such persons of religious liberty and violates the Fourteenth Amendment to the Constitution of the United States	11–14
A. Liberty of religious belief and doctrine is protected by the Fourteenth Amendment against impairment by the States	11
B. The belief and doctrine of appellees is religious in character	11
C. The State of West Virginia deprives the appellees of liberty guaranteed to them by the Fourteenth Amendment by requiring them to surrender it as a condition of attending public schools of that State	13
POINT III—Such deprivation of religious liberty is without due process of law since the State Board's regulation is not a proper exercise of the State's police power	14–19
A. The Courts and not the State legislative authorities must decide when religious liberty must yield to the exercise of a State's police power	15

PAGE

B. In a case involving minorities, the Courts should make an even more searching judicial inquiry to see that any abridgement of the liberties of such minorities is by due process of law 16

C. *The test to be applied is whether the failure* to salute the flag as required by the State Board's regulation presents such a "clear and present danger to the community" as to justify the State's exercise of its police power to the extent of overriding appellee's religious liberty 18

POINT IV—Congress having entered the field of legislation by enactment of Section 7 of the Act of June 22, 1942 (Public Law 623, 77th Cong. Ch. 435, 2nd Sess. Tit. 36 U.S.C.A. Supp. 1942, Sec. 172), and having expressed the national policy in the matter of saluting the flag of the United States, the regulation of the State Board is involved 20–23

CONCLUSION 23

APPENDIX A 24–25

APPENDIX B (attached to the brief)

Table of Cases Cited

PAGE

Adams Express Co. *v.* Croninger, 226 U. S. 49 22

Barnette et al. *v.* West Virginia State Board of Education et al., 47 F. Supp. 251 ..... 2, 12, 15, 16, 18, 19
Bolling *v.* Superior Court (Supreme Court of Washington, No. 28909, filed Jan. 29, 1943, opinion not yet published) 9, 12
Bridges *v.* California, 314 U. S. 252 18

Cantwell *v.* Connecticut, 310 U. S. 296 ..... 11, 12, 18
Charleston and Western Carolina Ry. Co. *v.* Varneville Furniture Co., 237 U. S. 597 ..... 22, 23
Chic., R. I. and Pacific Ry. *v.* Hardwick Elevator Co., 226 U. S. 426 23
Commonwealth *v.* Johnson, 309 Mass. 476 9
Commonwealth *v.* Nemchik (unpublished) (Court of Quarter Sessions, Luzerne County, Penna.) 9
Cummings *v.* State (Supreme Court of Mississippi, No. 35155, Jan. 25, 1943, opinion not yet published) 15

Davis *v.* Beason, 133 U. S. 333 18

Hamilton *v.* Regents, 293 U. S. 245 ..... 14, 18
Hering *v.* State Board, 303 U. S. 624 6
Herndon *v.* Lowry, 301 U. S. 242 18
Hines *v.* Davidowitz, 312 U. S. 52 21

In re Reed, 262 App. Div. (N. Y.) 858 9

Johnson *v.* Deerfield, 306 U. S. 621 6
Jones *v.* Opelika, 316 U. S. 584 ..... 2, 8

Kansas *v.* Smith, 155 Kansas 588 9

Leoles *v.* Landers, 302 U. S. 65 6
Lovell *v.* City of Griffen, 303 U. S. 444 13

Minersville School District *v.* Gobitis, 310 U. S. 586 ..... 4, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 23

PAGE

Missouri ex rel. Gaines *v.* Canada, 305 U. S. 337 ..... 13, 14

Reynolds *v.* U. S., 98 U. S. 145 18

Southern Ry. *v.* Indiana R. R. Commission, 236 U. S. 439 23

State *v.* Lefebre, 20A (2d) 185 (N. H. 1941) 8

Terral *v.* Burke Construction Co., 257 U. S. 529 14

U. S. *v.* Carolene Products Co., 304 U. S. 144 16

U. S. *v.* McIntosh, 283 U. S. 605 19

Table of Statutes Cited

Act of June 22, 1942, Section 7, Title 36, U.S.C.A. Supp. 1942, Sec. 172 ..... 7, 10, 20, 22

West Virginia Code of 1937, Sec. 1730, Ch. 18, Art. 2, Sec. 5 ..... 4, 13

West Virginia Code of 1937, Sec. 1734, Ch. 18, Art. 2, Sec. 9 5

West Virginia Code of 1937, 1941 Cumulative Supp. Sec. 1847, Ch. 18, Art. 8, Sec. 1 ..... 4, 14

West Virginia Code of 1937, 1941 Cumulative Supp. Sec. 1851, Ch. 18, Art. 2, Sec. 5a 5

West Virginia Code of 1937, 1941 Cumulative Supp. Sec. 4904(4) Ch. 49, Art. 1, Sec. 4 ..... 6, 14

West Virginia Code of 1937, 1941 Cumulative Supp. Sec. 4904 (49) Ch. 49, Art. 5, Sec. 1 ..... 6, 14

Miscellaneous

1 Bill of Rights Review, 627 8

Resolution of West Virginia State Board of Education, adopted Jan. 9, 1942 ..... 2, 5, 13, 15, 22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, composed of HONORABLE W. W. TRENT, President, MARY H. DAVISSON, THELMA B. LOUDIN, RAYMOND BREWSTER, LYDIA C. HERN, L. V. THOMPSON, and MRS. DOUGLAS W. BROWN, and all other boards, officials, teachers and persons subject to the jurisdiction and control of said STATE BOARD OF EDUCATION,

Defendants-Appellants,

vs.

WALTER BARNETTE, PAUL STULL, and LUCY McCLURE,

Plaintiffs-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Preliminary Statement

The American Civil Liberties Union is a non-partisan, non-sectarian organization, national in scope, with members in the State of West Virginia. The purpose of the

American Civil Liberties Union is to defend the fundamental liberties guaranteed to all Americans, regardless of creed, class or condition, by the Bill of Rights. Because the American Civil Liberties Union firmly believes that "our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be" (cf. dissent of Justices Black, Douglas and Murphy in *Jones* v. *City of Opelika*, 316 U. S. 584 at 623 (1942)), this brief *amicus curiae* is filed. It is solely in the interests of religious tolerance and reasonable solutions that the undersigned—none of whom are members of Jehovah's Witnesses or subscribers to their view on flag-saluting—have subscribed their names to this brief in support of the unanimous decision of the District Court for the Southern District of West Virginia (sitting as a three-judge court) (47 F. Supp. 251) (R. 48-54)*. It is submitted that the opinion of Circuit Judge Parker correctly decided the case and should be upheld by this Court.

The Issue

The only issue before the Court below, and the only issue before this Court on appeal, is whether the regulation of the West Virginia Board of Education**, which requires all pupils in public schools to salute the flag in a specified manner and provides that failure to salute shall be dealt with as "insubordination", when applied to the appellees, who admittedly have religious scruples about

---

* References to the Record are indicated "R."

** The full text of this regulation, adopted Jan. 9, 1942, is set forth in Appendix A.

saluting the flag (see opinion below, R. 54, 47 F. Supp. 251, at 253), is a valid and constitutional regulation?

The Court below held "that the regulation of the Board requiring that school children salute the flag is void in so far as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined" (47 F. Supp. 251, at 255).

Statement of the Case

The facts are well summarized in the first paragraph of the opinion of the Court below as follows (R. 49):

> "This is a suit by three persons belonging to the sect known as 'Jehovah's witnesses', who have children attending the public schools of West Virginia, against the Board of Education of that state. It is brought by plaintiffs in behalf of themselves and their children and all other persons in the State of West Virginia in like situation, and its purpose is to procure an injunction restraining the State Board of Education from enforcing against them a regulation of the Board requiring children in the public schools to salute the American flag. They allege that they and their children and other persons belonging to the sect of 'Jehovah's witnesses' believe that a flag salute of the kind required by the Board is a violation of the second commandment of the Decalogue, as contained in the 20th chapter of the book of Exodus; that because of this belief they cannot comply with the regulation of the Board; that, if they fail to comply, the children will be expelled from school, and thus be deprived of the benefits of the state's public school system; and that plaintiffs, in such event, will have to provide them education in private schools at great expense or be subjected to prosecution for crime for failing to send them to school, as required

by the compulsory school attendance law of the state. They contended, therefore, that the regulation amounts to a denial of religious liberty and is violative of rights which the first amendment to the federal Constitution protects against impairment by the federal government and which the 14th Amendment protects against impairment by the States."

The defendants-appellants moved to dismiss the bill on the ground that the regulation of the Board was a proper exercise of the statutory power vested in it and that under the doctrine of *Minersville School District* v. *Gobitis*, 310 U. S. 586, the flag salute, which the regulation requires, cannot be held a violation of the rights of the plaintiffs-appellees (R. 43-45). The parties agreed that it be submitted for final decree on the bill and motion to dismiss. The Court denied the motion and issued an injunctive order enjoining the Board from enforcing the regulation against children having conscientious scruples against giving such salute (R. 45-46).

The appellants are the acting Board of Education of the State of West Virginia and joined with them are all other boards, officials and teachers subject to its control. This Board has general supervision over all public schools in West Virginia and is given power to determine the State's educational policies (except those of the State University) and to "make rules for carrying into effect the laws and policies of the State relating to education". (*The West Virginia Code of 1937*, Sec. 1730, Chap. 18, Art. 2, Sec. 5.) The statutes further provide that minors must attend public schools, or obtain equivalent private instruction, until they reach the age of sixteen. (*Op. Cit.* 1941 Cumulative Supplement, Sec. 1847, Chap. 18, Art. 8, Sec. 1.)

The instruction to be given in public schools includes "instruction in the history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." (*Op. Cit.* Sec. 1734, Chap. 18, Art. 2, Sec. 9.)

On January 9, 1942, The West Virginia State Board of Education adopted the regulation here in question. The full text of the regulation is set forth in Appendix A. It will be noted that the regulation requires all teachers and pupils to participate in the "commonly accepted salute to the Flag of the United States" as a "regular part of the program of activities in the public schools". The prescribed salute as stated in the regulation is as follows: "the right hand is placed upon the breast and the following pledge is repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; One Nation, indivisible, and with liberty and justice for all.'"

It is not to be overlooked that the regulation provides for a penalty for failure to perform the salute (in the precise manner prescribed) as follows:

> "provided, however, that the refusal to salute the Flag be regarded as an act of insubordination and shall be dealt with accordingly."

The West Virginia Code (1941 Cumulative Supplement, Sec. 1851, Chap. 18, Art. 8, Sec. 5a) provides for dealing with insubordination of pupils as follows:

> "If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or

> state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

By Sec. 1851 and Sec. 1847 of the Code (*Op. Cit.*) such persons would be guilty, if convicted, of a misdemeanor and subject to a fine not exceeding $50 and a jail term of not exceeding thirty days.

Furthermore the children may be proceeded against as delinquents under Chap. 49, Art. 1, Sec. 4 and Art. 5, Sec. 1 of *The West Virginia Code* (1941 Cumulative Supplement. Sec. 4904 (4) and 4904 (49)).

The views of Jehovah's Witnesses on flag-saluting are so well known to this Court that it is unnecessary to summarize them here at length. (Cf. Briefs filed in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940); *Johnson* v. *Deerfield*, 306 U. S. 621 (1939); *Hering* v. *State Board*, 303 U. S. 624 (1938); *Leoles* v. *Landers*, 302 U. S. 65 (1937).) They are sufficiently summarized for this appeal in the excerpt from the opinion of the Court below quoted at page 3 above. A full exposition may be found in the sole Exhibit introduced in the proceedings in the Court below (R. 16-43), which is a pamphlet entitled "God and the State". It should be noted that Jehovah's Witnesses are taught, and in turn teach their children, that saluting the flag is idolatrous, that it violates the second commandment of the Decalogue (Exodus 20:3-5) (R. 49) and that if they salute the flag

in violation of that commandment, the penalty is "death everlasting, from which there is no resurrection"; while if they refuse to salute, "the most severe punishment the State can inflict upon him is death, from which death God will resurrect his faithful servants who have been put to death by man because of faithfulness to God." (Exhibit A, R. 41.)

Summary of Argument

In support of the decision of the District Court, argument is submitted on the following points:

1. The decision of this Court in *Minersville School District* v. *Gobitis*, 310 U. S. 586, should be reversed.

2. Enforcement of the regulation of the State Board, in so far as persons holding a religious belief and doctrine against giving the flag salute are concerned, deprives such persons of religious liberty and violates the Fourteenth Amendment to the Constitution of the United States.

3. Such deprivation of religious liberty is without due process of law since the State Board's regulation is not a proper exercise of the State's police power.

4. Congress having entered the field of legislation by the enactment of Sec. 7 of the Act of June 22, 1942, and having expressed the national policy in the matter of saluting the Flag of the United States, the regulation of the State Board is invalid.

POINT I

The decision of this Court in *Minersville School District* v. *Gobitis* (310 U. S. 586) should be reversed.

Affirmance of the decision of the Court below requires that this Court reverse its decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586. The facts in that case were in all essential respects the same as in this case save for the fact that a regulation of the Minersville School District of Pennsylvania, instead of a regulation of the West Virginia State Board of Education was in issue.

We urge, first, that the *Gobitis* case was wrongly decided. This assertion is based, not upon the opinion of the legal profession generally (although such opinion has been preponderantly unfavorable to the *Gobitis* decision); but upon the expressed opinion of four of the seven justices, now members of this Court, who participated in the *Gobitis* decision. (*Op. Cit.*, 310 U. S. 586, dissenting opinion; *Jones* v. *City of Opelika*, 316 U. S. 584, special dissenting opinion.)

Only one of the unfortunate effects of the *Gobitis* decision has been the efforts to use it to justify the conviction of children refusing to give the salute on the ground that they are delinquents, and to take such children from their homes and confine them to State Reformatories. To the credit of all the higher courts, which have considered the question, however, they have "shrunk from so barbaric a result". (Cf. "*The Gobitis Case in Retrospect*" (1941), 1 Bill of Rights Rev. 627.) As the Supreme Court of New Hampshire said in such a case (*State* v. *Lefebvre*, 20 A. (2d) 185, 187 (N. H. 1941):

> "If the order appealed from is executed, these three children and their parents will be visited with

> the breaking up of the family, an institution of primary value in our social life. * * * it is impossible for us to attribute to the Legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious religious scrupies not shared by the majority of the community * * *."

Other courts have reached the same decision as the New Hampshire Supreme Court in refusing to carry the implications of the *Gobitis* decision to such an extreme result. *Commonwealth* v. *Johnson*, 309 Mass. 476; *Kansas* v. *Smith*, 155 Kansas 588; *Bolling* v. *Superior Court*, Washington S. C. No. 28909, Filed Jan. 29, 1943, opinion as yet unpublished; *In re Reed*, 262 App. Div. (N. Y.) 858; *Commonwealth* v. *Nemchik* (unpublished) (Court of Quarter Sessions, Luzerne Co., Penna.).

The precise question at issue in these cases admittedly was not before this Court in the *Gobitis* case. Now, however, that this Court has an opportunity to reverse that unfortunate decision, the record of attempts to apply it so as to make criminals of school children whose only "crime" is, in obedience to conscience, to refuse to salute the flag, cannot be overlooked by this Court.

Chief Justice Stone's dissent in the *Gobitis* case has impressed us deeply and the following short paragraph from his opinion sets forth in moving and succinct fashion the doctrine which we hope this Court may now think it proper to adopt:

> "The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonable free expression, and his free-

> dom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion."
>
> *Minersville School District, et al.* v. *Gobitis*, 310 U. S. 586, 604.

We urge as a second ground for reversal the fact that Congress, since the *Gobitis* case was decided, has entered "the field of legislation here under discussion". (Cf. *Minersville School District* v. *Gobitis*, 310 U. S. 586, prevailing opinion at 600.) By Act of June 22, 1942 (Title 36 U. S. C. A. Supp. 1942, Sec. 172) Congress has prescribed the manner in which the flag of the United States shall be saluted. Since this is a Congressional enactment in a field of national cognizance, a statute or regulation of any State (especially if it conflicts with the Act of Congress) must be invalid.

Our Points II and III, which follow, are directed at sustaining the first ground and our Point IV, the second ground, for reversal of the *Gobitis* case, as stated above.

POINT II

Enforcement of the regulation of the State Board, in so far as persons holding a religious belief and doctrine against giving the flag salute are concerned, deprives such persons of religious liberty and violates the Fourteenth Amendment to the Constitution of the United States.

A. Liberty of religious belief and doctrine is protected by the Fourteenth Amendment against impairment by the States.

Since the decision of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, there is no longer any doubt that religious liberty is protected from impairment by the States by the Fourteenth Amendment.

In that case (at p. 303) this Court said:

> "The fundamental concept of liberty embodied in that amendment (i.e. the Fourteenth Amendment) embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteen Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

B. The belief and doctrine of appellees is religious in character.

The fact that the vast majority of Americans do not see in the salute to the national Flag other than a "ceremony calculated to inspire in the pupils a proper love of country and reverence for its institutions" (opinion

below) (R. 50-51) does not belie the fact that Jehovah's Witnesses are quite honest and sincere in their belief that saluting the flag is idolatrous. The inability of the majority to comprehend the religious significance of the flag salute to which these appellees are opposed should not lead the Court to attempt to decide when a belief is a religious one.

On this point we quote also the opinion of the Court below (R. 51):

> "Courts may decide whether the public welfare is jeopardized by acts done or omitted because of religious belief; but they have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience. There is hardly a group of religious people to be found in the world who do not hold to beliefs and regard practices as important which seem utterly foolish and lacking in reason to others equally wise and religious; and for the courts to attempt to distinguish between religious beliefs or practices on the ground that they are reasonable or unreasonable would be for them to embark upon a hopeless undertaking and one which would inevitably result in the end of religious liberty."

This Court has forcefully condemned as "censorship of religion" a State Statute which conferred on a public official the power to determine whether or not a cause was a religious one. (*Cantwell* v. *Connecticut*, 310 U. S. 296, 305.)

The Supreme Court of Washington in a recent case (*Bolling* v. *The Superior Court* (opinion as yet unpublished) No. 28909, Filed Jan. 29, 1943) gives an interesting historical example of the religious significance of a gesture:

"Many examples of the importance of a mere gesture may be found in history. In the time of the Roman empire it was customary for the people to burn a pinch of incense before a statue of the emperor. The early Christians, while recognizing the sovereignty of the emperor, refused to perform this ceremony, deeming it idolatrous. Pliny the Younger, a lawyer of distinction, acting as governor of a Roman province in Asia Minor, had occasion to write to his friend, the Emperor Trajan, describing his difficulties in ferreting out and punishing Christians, as such, residing within his jurisdiction. He refers to the fact that an order to offer incense before the statue of the emperor was one test applied to ascertain whether or not a particular individual was a Christian. A refusal to perform the rite was equivalent to an affirmation that the one refusing was a Christian, and subject to the severe penalties of the Roman law. A phrase, or the making of a gesture, which to most people may seem either right or possibly unimportant, may to others appear to be of great significance."

C. The State of West Virginia deprives the appellees of liberty guaranteed to them by the Fourteenth Amendment by requiring them to surrender it as a condition of attending public schools of that State.

The West Virginia State Board of Education has been constituted by the Legislature of that State to have control over that State's public school system. (*The West Virginia Code*, Sec. 1730, Ch. 18, Art. 2, Sec. 5.) Accordingly action of that Board is state action for the purposes of this case. (*Lovell* v. *City of Griffin*, 303 U. S. 444; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337.)

The provisions of the regulation of the State Board (App. A) are clear: a child must salute the flag, and if he refuses he is guilty of an act of insubordination; he

may be expelled and proceeded against as a delinquent. (*The West Virginia Code*, 1941 Cumulative Supplement, Sec. 4904 (4) and 4949 (49).) Since every child is required to attend school until he is sixteen (*Op. Cit.*, Sec. 1847) the regulation of the State Board, as applied to children of these appellees, amounts to withholding from them the privileges of public school education unless they abjure their religious convictions. This, we submit, is to deprive them of their religious liberty. (*Terral* v. *Burke Construction Co.*, 257 U. S. 529; and cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, and *Hamilton* v. *Regents*, 293 U. S. 245.)

The question then arises as to whether they are deprived of such liberty by due process of law.

POINT III

Such deprivation of religious liberty is without due process of law since the State Board's regulation is not a proper exercise of the State's police power.

Discussion of this point brings us to the main point of dispute in this case. Of the sincerity of the religious beliefs of these appellees no question has been raised. The State has threatened to deprive them of their religious liberty and to deprive them of other liberties and privileges. In the language of the opinion below, "*Can it be said • • • that the requirement that school children salute the flag has such a direct relation to the safety of the state, that the conscientious objections of plaintiffs must give way?*"

A. The Courts and not the State legislative authorities must decide when religious liberty must yield to the exercise of a State's police power.

With due respect it is nevertheless submitted that one of the most unfortunate aspects of the *Gobitis* decision was the expressed doctrine that the courts are not free to pass judgment upon the legislative opinion that "the country will be better served by conformity than by the observance of the religious liberty which the Constitution prescribed." To say that "the courtroom is not the arena for debating issues of educational policy" is to overlook entirely the religious liberty aspect of the present issue. The State Board by its regulation (App. A) is not trying *to educate* the children of the appellees in any true sense; it is admittedly trying *to compel* them to perform an act (which their religion forbids them to perform). If this Court holds that it will no longer scrutinize legislation to determine when constitutional rights must yield to the exercise of the police power, then it will be abdicating the most important duty which rests on it under the Constitution. The effect of any such doctrine will be to enhance beyond any previous conception the police power of the states and religious liberty will be at the mercy of shifting political majorities. "Constitutional rights are not subject to nullification by reference to a popularity poll." (Alexander, J., dissenting in *Cummings* v. *State* (Supreme Court of Mississippi, No. 35155, Jan. 25, 1943, opinion not yet published).) We cannot believe that this Court has intended to hold—or will hold—that religious liberty, or any liberty guaranteed by the Bill of Rights, is a "local question".

We approve the language of the opinion of Judge Parker in the Court below (R. 53):

> "This bill of rights is not a mere guide for the exercise of legislative discretion. It is part of the fundamental law of the land, and is to be enforced as such by the courts. If legislation or regulations of boards conflict with it, they must give way; for the fundamental law is of superior obligation."

B. In a case involving minorities, the Courts should make an even more searching judicial inquiry to see that any abridgment of the liberties of such minorities is by due process of law.

The appellees in this case are members of a religious minority which has been subjected to persecutions unparalleled in this country since the days of the Mormons. The whole story of the prejudice against, and persecution of, Jehovah's Witnesses has been told many times elsewhere. (Cf. for example, the pamphlet of the American Civil Liberties Union, "Jehovah's Witnesses and the War", Jan. 1943, a copy of which is annexed to this brief.) It is even safe to assume that the regulation of the School Board (adopted in January, 1942) (App. A) which is involved in this case was conceived in the milieu of prejudice which has grown up against these people because of their misunderstood attitude on flag-saluting.

It is submitted that this is "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities", and calls "for a correspondingly more searching judicial inquiry". (*United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.)

It is not enough that the "effective means of inducing political changes are left free from interference". (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 600.)

In the case of minorities such as Jehovah's Witnesses the effectiveness of such means may be purely illusory. A persecuted minority may suffer long before it can alleviate its burdens by way of the ballot box. It looks, and has the right to look under our Constitutional system, to the courts, and particularly to this Court, for redress of grievances.

It may be significant that since the *Gobitis* case was decided in 1940 no legislature or school board, so far as we know, has repealed or modified a compulsory flag salute law or regulation. Indeed some additional states have adopted it—including West Virginia, whose regulation is at issue in this case. Pragmatically, this does not commend the doctrine that somehow legislative authorities will themselves abandon "foolish legislation" if "the effective means of inducing political changes are left free".

We maintain that compulsion has never in this country been the handmaiden to patriotism. Neither the Constitution nor the courts are powerless to exorcise the whiplash of tyranny over a religious minority from our national scene. In the words of Chief Justice Stone in his dissent in the *Gobitis* case:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legis-

lation which we have recently held to infringe the constitutional liberty of religious and racial minorities."

Minersville School District, et al. v. *Gobitis*, 310 U. S. 586, 606, 607.

C. The test to be applied is whether the failure to salute the flag as required by the State Board's regulation presents such a "clear and present danger to the community" as to justify the State's exercise of its police power to the extent of overriding appellees' religious liberty.

Freedom of religion implies not only freedom of belief but also freedom to act upon belief, so long as such action does not endanger the safety of the State. (*Cantwell* v. *Connecticut*, 310 U. S. 296.) No one contends "that what a man may do or refrain from doing in the name of religious liberty is without limitations". (Opinion below (R. 52).) This Court has held that he may not refuse to bear arms (*Hamilton* v. *Regents*, 293 U. S. 245) and he may not engage in polygamy or other practices which endanger the public health, morals or safety of the community. (*Davis* v. *Beason*, 133 U. S. 333.)

In cases involving freedom of speech and the exercise of police power this Court has wisely announced and applied the "clear and present danger" rule. This means that freedom of speech is not to be abridged unless its exercise presents a clear and present danger to the community. (*Bridges* v. *California*, 314 U. S. 252; *Herndon* v. *Lowry*, 301 U. S. 242; Cf. *Reynolds* v. *United States*, 98 U. S. 145, 163.) There is every reason to apply this same rule to the exercise of religious freedom.

Can it be said that the religious freedom of the appellees must give way because there is a clear and present danger to the State if these school children do not salute the flag? If grown men can advocate doctrines tending

to the overthrow of the government under the constitutional guaranty of freedom of speech (so long as their advocacy does not present a clear and present danger to society), it is absurd to say that the failure of school children to salute the flag presents any greater danger to public safety.

Indeed the policy implicit in the State Board's regulation—to compel the child to salute and to punish him as a delinquent if he does not—not only has no tendency to instruct the children of West Virginia in loyalty to the flag and Constitution of the United States, but on the contrary, instils hatred and bitterness in such children and their parents. As such the conduct of the State Board —not the children who fail to salute—is the more "clear and present danger" to society.

As succinctly stated by Judge Parker in the opinion below (R. 54):

> "The salute of the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guarteed by the fundamental law are respected."

The fact that we have constitutional guaranties requires accommodation of the powers which government normally exercises, when no question of civil liberties is involved, to the constitutional demand that those liberties be protected against the action of government itself. (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 603.) "Unnecessary clashes" between the proper demands of the State and the dictates of conscience should be avoided. (*United States* v. *McIntosh*, 283 U. S. 605.)

POINT IV

Congress having entered the field of legislation by the enactment of Sec. 7 of the Act of June 22, 1942 (Public Law 623, 77th Cong. Ch. 435, 2nd Sess., Tit. 36 U. S. C. A. Supp. 1942, Sec. 172), and having expressed the national policy in the matter of saluting the flag of the United States, the regulation of the State Board is invalid.

At the time that the *Gobitis* case was decided by this Court, Congress had not entered the field of legislation and the opinion of the majority in the *Gobitis* case took note of this fact. (310 U. S. 586, 600.) However, on June 22, 1942, Congress enacted the following as a part of a codification of the rules and customs regarding the use of and respect due the flag of the United States:

> "Sec. 7. That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute."

Since it is the purpose of the salute to the flag to promote "national cohesion" and "national unity" (*Minersville School District* v. *Gobitis*, 310 U. S. 586, 596-7), the subject is of national cognizance and the Act of Congress

renders the acts and regulations of State legislative authorities invalid, whether or not they conflict with the Act of Congress.

Two flags float above the State House of most states—on the left the flag of the state, on the right the flag of the United States. Each is the emblem of an independent political society organized directly by its citizens. If the government in Washington should assume to imprison West Virginia children for refusing to salute the emblem of that state, citizens of West Virginia would feel very properly that the representatives of New York and California were meddling in matters with which they had no concern. It is for the citizens of West Virginia to determine what observance the state demands of children, and to decide what laws will best support the honor of their flag.

Conversely, it is not for West Virginia to put the Stars and Stripes in the position where innocent children following the dictates of religious training might suffer physical injury or impairment of their intellectual development because the children do not yield it what West Virginia considers suitable respect. This is a matter that concerns Maine, and New York, and California. It concerns the unity of a hundred and thirty million people. Only the representatives of that hundred and thirty million can establish the ceremony for saluting the American flag and define and punish the offense of disloyalty to the common emblem of the United States.

We submit that the present case is governed, in principle, by *Hines* v. *Davidowitz*, 312 U. S. 52. There a Pennsylvania statute for the registration of aliens was held invalid because Congress had dealt with the same subject in a national act. There was nothing in the Federal Constitution to forbid Pennsylvania to register aliens,

nor did the Pennsylvania statute conflict with the Act of Congress in the sense that it was not perfectly practicable for aliens to obey both at once. Nevertheless the Pennsylvania statute was declared invalid because the subject was one of national cognizance and because Congress had indicated by its enactment the policy which it had determined to pursue. We submit that the obligation of citizens towards the national emblem is even more clearly of national cognizance.

Nevertheless in this case the situation is not merely that Congress and the State Board are occupying the same field with perfectly consistent legislation. The fact is that the State Board's prescribed method of saluting the flag *conflicts* with that prescribed by Congress. *Congress says:* "* * * civilians will always show full respect to the flag when the pledge is given by merely standing at attention * * *". *The West Virginia State Board orders:* "* * * that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated * * * and that all teachers * * * and pupils * * * shall be required to participate in the salute * * *".

If Congress in a field of national cognizance says that proper respect for the flag may be shown merely by standing at attention, it is not proper for West Virginia or any other state or local authority to require more and to seek to compel a particular form of salute which Congress has not seen fit to adopt. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491 506; *Charleston & Western Carolina Railway Co.* v. *Varnville Furniture Co.*, 237 U. S. 597.)

Furthermore and of great importance is the fact that Congress did not deem it wise, or see fit, to impose any

penalties for failure to salute the flag. Obviously West Virginia may not create an offense and prescribe a penalty as to a matter of national concern, as to which Congress has legislated, but for which it has prescribed no penalty.

In *Charleston & Western Carolina Railway Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, at 604, Justice Holmes said:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go. *Chicago, R. I. & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435, *Southern Railway* v. *Indiana Railroad Commission*, 236 U. S. 439, 446, 447. The legislation is not saved by calling it an exercise of the police power * * *."

Conclusion

The regulation of the State Board is unconstitutional, and it is invalid because it is in conflict with an Act of Congress legislating in a field of national cognizance. The decision in *Minersville School District* v. *Gobitis* (310 U. S. 586) should be reversed and the decision of the District Court should be affirmed.

Respectfully submitted,

WILLIAM G. FENNELL,
OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
Of the New York Bar,

HOWARD B. LEE,
Of the West Virginia Bar,
Attorneys for the American Civil Liberties Union, Amicus Curiae.

APPENDIX A

Resolution of the West Virginia State Board of Education adopted January 9, 1942

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitution of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

JEHOVAH'S WITNESSES AND THE WAR

"The essence of religion is belief in a relation to God involving duties superior to those arising from any human relations".

Chief Justice Charles E. Hughes — U.S. v. Macintosh

American Civil Liberties Union
170 Fifth Avenue
New York City

181

January, 1943

JEHOVAH'S WITNESSES AND THE WAR

Introduction

THE undersigned join in presenting this extraordinary record of attacks upon the liberties of a religious organization. The attacks constitute a challenge to democratic liberty and religious tolerance. They present in new form the ancient conflict that at times arises between men's convictions of their duty to God and the commands of the State.

Jehovah's Witnesses have been subjected to a religious persecution unmatched in our history as a nation save for the violence years ago against the Mormons. More than any other minority they are suffering war-time attack on their freedom of conscience; yet their only offenses (outside a few cases of disorderly conduct) are their refusal to salute the flag, their insistence upon conducting their ministry in public, the distribution of literature in public places and house-to-house—often, it is true, by annoying methods; and the refusal of their men of military age to accept military service. Yet they do not call themselves pacifists, for they are committed to fight in a war for Jehovah—an obviously academic reservation.

The record in these pages shows that thousands of their children have been expelled from the public schools all over the country for refusal to salute the flag; that several hundred men of military age are imprisoned for refusing compulsory military service; that they alone have been the victims of "patriotic" mob violence; that hundreds of their members have been arrested for distributing literature—and that they have been compelled to bring more cases in the courts involving their rights, and thereby the rights of all of us, than any other organization in the country.

No amount of persecution impairs the zeal with which Jehovah's Witnesses serve their faith. Persecution of them is not only futile but a reflection upon all those who tolerate it. The degree to which our community accords Jehovah's Witnesses their rights measures our own loyalty to the ideals we profess. Protection of their freedom of speech and conscience is the protection of our own, regardless of whatever attitude we may take to their often annoying public conduct.

Solutions can be found to the conflict between the commands of the State and their concept of duty to God which will not sacrifice any reasonable requirements of the community. It is suggested that their children be excused from flag saluting without impairing patriotic education; their literature could be freely distributed constitutionally without violating the rights of householders or otherwise creating disorder; their men of military age can be exempted from compulsory military service, and given civilian service like conscientious objectors.

It is in the interests of religious tolerance and reasonable solutions that the undersigned—wholly dissociated from any connection with or endorsement of Jehovah's Witnesses—subscribe to the publication of this pamphlet and commend it to the attention of all liberty-loving Americans.

DR. HENRY A. ATKINSON (New York)
BISHOP JAMES CHAMBERLAIN BAKER (California)
HARRY L. BINSSE (New York)
REV. W. RUSSELL BOWIE (New York)
DR. HENRY SLOANE COFFIN (New York)
DR. HENRY HITT CRANE (Detroit)
DR. FREDERICK MAY ELIOT (Boston)
DR. HARRY EMERSON FOSDICK (New York)
DR. JOHN HAYNES HOLMES (New York)
RABBI MORRIS S. LAZARON (Baltimore)
REV. HALFORD E. LUCCOCK (Conn.)
BISHOP FRANCIS J. MCCONNELL (New York)
REV. JOHN HOWARD MELISH (Brooklyn)
RT. REV. WALTER MITCHELL (Arizona)
DR. REINHOLD NIEBUHR (New York)
BISHOP G. BROMLEY OXNAM (Boston)
RT. REV. EDWARD L. PARSONS (San Francisco)
REV. DR. D. DE SOLA POOL (New York)
RT. REV. MSGR. JOHN A. RYAN (Washington, D.C.)
RABBI ABBA HILLEL SILVER (Cleveland)
DEAN CLARENCE R. SKINNER (Boston)
REV. ERNEST F. TITTLE (Illinois)

I

Organization and Beliefs

THE religious association of Jehovah's Witnesses, who object to the use of the word "sect" to describe them, has expanded from its origin in the United States sixty years ago to many lands. Its international headquarters are the Watchtower Bible and Tract Society with a large plant in Brooklyn, New York. Its membership in the United States is conservatively estimated at half a million persons. Its international membership probably runs into several millions. Its largest affiliations are in Canada, England, Germany, Australia and South Africa. Membership has been growing rapidly in recent years, particularly in English-speaking countries. It has of course been suppressed in all countries under Axis control—and strangely in Canada.

Recruits are secured by the activity of Witnesses in conducting propaganda on the public streets and house to house, by the distribution of literature and the playing of phonograph records. The organization has no clergymen nor churches. A number of special representatives charged with directional field work are "ordained ministers" in the faith of Jehovah. Assisting them are regular full-time "publishers" who devote all their time to preaching the gospel and to organization of "publishing companies," their local units. There are in addition many part-time "publishers."

Contact between members is maintained by two bi-weekly magazines, the *Watchtower* and *Consolation*, and by many books and pamphlets, published in almost incredible numbers reaching a total annual output of over 45,000,000 copies, in twenty-eight languages. Meetings are held in "Kingdom Halls" or in private homes, with regional and national conventions annually. Considerable radio time is also secured. Membership and activities cover the entire country reaching into the smallest communities.

Their Religious Beliefs

THE cardinal principles of Jehovah's Witnesses are described thus in excerpts from their literature.

"Jehovah's Witnesses are not a sect or a religious organization. They are in a class of faithful men mentioned in the

eleventh chapter of Hebrews whose sole purpose is to inform the people of God's purpose to establish a righteous government on earth, and in obedience to God's commandment to warn the people of the impending disaster upon the nations, the Kingdom of Jehovah God under Christ, which Kingdom is the Theocracy.

"There are unseen powers more powerful than man which are responsible for the present march of all nations to destruction. These superhuman powers are the devils, of which Satan is the chief.

"After the final war of Armageddon, God creates the new earth, the new righteous organization, which God will set up for the Government of the survivors of Armageddon and their righteous offspring. That organization will be carried on by the holy men of God of olden times prior to Christ who were faithful witnesses of Jehovah even unto death.

"All true and faithful followers of Jesus Christ are indeed and must be *witnesses* to Jehovah by declaring his name and his Kingdom under Jesus Christ. All such people must preach the Gospel of God's Kingdom in obedience to the Commandments.

"Religion, contrary to its claim of being Christian, has betrayed the peoples right into the powers of the Demons. Thereby religion turns mankind away from God's Kingdom, the Theocracy."

THEIR attitude to God and the State is expressed in the following quotations.

"Loyalty means to be obedient to the law.—Necessarily this means that obedience to God's law and commandments is first, and then obedience to the laws of the state which are not contrary to God's law. (*Rutherford, God and State*)

"All the nations of the present world are against the Theocracy. There are amongst the nations of earth two mighty factions which claim the right to rule and which nations are designated in the prophecy of Daniel as the "king of the north" and the "king of the south" and both of which are against the rule of the world by Jesus Christ,

who is Jehovah's King. The covenant people of God are on His side and entirely devoted to his purpose and therefore must be and *are at all times neutral* in all things of controversy between the nations of the evil world.

"The totalitarian ruling powers, composed of Nazis, Fascists and big religious leaders, now stand where they ought not to stand, claiming the right to rule the world and demanding that Jehovah's covenant people shall hail and bow down to totalitarian rulers, join their armies, fight under their banners, and when Jehovah's covenant people refuse to do so they are imprisoned and many put to death. In the face of all this God's covenant people stand firm on the side of the Theocracy even though they see their faithful ones being imprisoned and sent to death. Although the laws of such nations declare that a minister shall not be required to do military service, the acting authorities who have to do with carrying the law into operation say to these faithful covenant people of God: 'We do not recognize you as a minister, nor that you are a sincere conscientious objector to engaging in war; therefore you must join the fighting forces and fight under our banner.'

"The Faithful covenant people of God answer: 'We cannot do so. We are in covenant with Almighty God to do His will. To obey your commandment we must violate our covenant with God; and if we do so we shall suffer eternal destruction at the hands of the Almighty God. We will willingly conform ourselves to every law of the land that does not cause us to violate our covenant with Jehovah.'" (*Year Book, 1942*)

THE general attitude of Jehovah's Witnesses toward governments is therefore to obey every "righteous" law. Unrighteous laws are those which they are forbidden by their religious belief to obey. They do not commonly vote or serve on juries. Their refusal to salute the flag rests on the Biblical injunction:

"Thou shalt have no other Gods before me. Thou shalt not make unto thee any graven image, or any likeness of anything that is in the heavens above, or that is in the earth beneath, or that is in the water beneath the earth; thou

shalt not bow down thyself to them nor serve them; for I the Lord thy God am a jealous God visiting the iniquity of the fathers upon the children unto the third and fourth generations of them that hate me."

But though unwilling to salute an "image" they are entirely willing to take a pledge of respect and allegiance which they have thus formulated and to stand at attention with hats off:

"I have pledged my unqualified allegiance and devotion to Jehovah the Almighty God and to his Kingdom for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice for all. I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law as set forth in the Bible."

ON the issue of military service, Jehovah's Witnesses generally are opposed to participation in wars, reserving only the right to fight in a war for Jehovah. But the conduct of individual members is not controlled by any discipline, and members take varying positions on military service—some accepting combatant or non-combatant posts in the army, more taking service as conscientious objectors, and even more refusing all participation, with consequent imprisonment.

One widespread cause of antagonism to Jehovah's Witnesses is their opposition to other religious bodies on the ground that they pervert the purposes of "Almighty God as expressed in the Bible." Their pamphlets attack the Roman Catholic Church, Protestants, and Jews. They hold that organized religion is a "racket." They have therefore aroused the opposition of strong elements in the churches, as they have the defenders of conventional patriotism in the American Legion. The zeal of the Witnesses inevitably makes them provocative. They are insistent: they push their messages into the hands of passers-by, into the doors of homes, into public places. They are difficult to rebuff or discourage and when driven away come back for more. The behavior of such zealots results in alienating support of their rights and in a general hostility to them as a public nuisance.

Persecution

ALTHOUGH subjected to persecution in peace-time, war intensifies the conflict between the Witnesses and the requirements of law and it heightens popular prejudice. In Canada shortly after the outbreak of war they were declared an illegal association. They may not publish papers, distribute literature, or hold meetings. Some of their leaders who have persisted in so doing have been interned without hearing or trial. In Germany, they have been sent by the hundreds to concentration camps. One special camp reserved for them is said to have over 6,000 inmates. In England, where they enjoy more tolerance than in other parts of the British Commonwealth, over 500 of their members are in prison for refusing military or civilian service. Reports of their difficulties with the law come also from Australia, New Zealand and South Africa.

In the United States the war has brought a conflict with conscription which has resulted in the imprisonment of over 450 Witnesses who have refused either military service or assignment to conscientious objector camps, insisting upon recognition as "ministers." Mob violence, which reached a peak in 1940 following the disasters to the Allied cause in Europe, has continued sporadically, particularly in the Southwest, and with outbreaks in cities where the Witnesses were gathered in convention.

ATTORNEY General Francis Biddle has repeatedly warned against attacks on the Witnesses. In a speech before the National Conference on Social Work, June 2, 1941, he said:

> "We all know of the outrages committed against the members of the sect known as Jehovah's Witnesses, who, with misplaced zeal of martyrs, openly tempt retaliation for their attacks on the Catholic Church, so that grand juries refuse to return indictments. Where state officials should have been active in preventing this cruel persecution, they have in many instances permitted it to occur, and in some have been the leaders of the mob. And this betrayal of the rights of citizens is done in the name of patriotism, and failure to salute the flag is made an excuse to desecrate the principles of which the flag is a symbol. The test of our ability to preserve these principles is always sharper in times of crisis.

Hitler's methods cannot preserve our democracy, which demands justice for all alike."

At the request of the Attorney General, several U.S. District Attorneys have made radio addresses cautioning against attacks on Witnesses and upholding their right to carry on propaganda without hindrance.

The Witnesses are obliged incessantly to contest in the courts the restrictions upon them. They have carried case after case to the United States Supreme Court. Their general counsel, Hayden Covington, is involved in litigation all over the country, either to secure their rights to distribute literature, to contest expulsions from the public schools, or to defend members against criminal charges. Court decisions on the whole have become increasingly favorable to the contentions of Jehovah's Witnesses, as is shown by the record in Section V.

It is a reflection upon progressive forces in American life that the Witnesses have been aided in their many court contests by only a very few agencies, chiefly the American Civil Liberties Union—with incidental help on issues raised in the Supreme Court—in one case, by the American Bar Association, involving the flag-salute, and in a case involving taxation on the sale of literature, by the American Newspaper Publishers Association and the Seventh Day Adventists. Yet the rights which their court contests seek to uphold are rights applicable to all persons; and their success in establishing them has been of immense benefit to the cause of civil liberties generally.

II

Mob Violence

ACTS of violence against Jehovah's Witnesses reached a peak in 1940 in the feeling aroused by the Nazi conquests of Western Europe. The story has been told in substance in a previous A.C.L.U. pamphlet, *The Persecution of Jehovah's Witnesses.* Violence declined during 1941 and 1942 but the attacks though less frequent have been shocking. The war has intensified popular antagonism to their refusal to salute the flag and to participate

in the war. Most of the attacks in the past two years have been in the Southwest with scattered outbreaks in almost every state of the nation, almost always in small communities where prejudice and action are easily organized, and hard to check.

The annual conventions or "Theocratic Assemblies" of the Witnesses in September 1942 were the occasion for violence in several cities. Members were gathered to hear the message of their leader, N. H. Knorr, carried to them by wire from the main convention at Cleveland, Ohio. Knorr's theme was "Peace, Can It Last."

The Cleveland convention went off without trouble thanks to the good sense of the city authorities. 20,000 Witnesses gathered on September 20th, the same day that an army show was being staged in the municipal auditorium. Before and after the meetings at their convention hall, the Witnesses posted themselves at almost every street intersection to sell their literature. Tension grew. A serious situation was averted by Mayor Frank Lausche who in public announcements upholding freedom of speech and assemblage, urged the townspeople not to provoke violence. He also announced he would not appear before the convention as he had been scheduled to do and urged citizens to give their attention to the army show.

But in Little Rock, Arkansas, and Klamath Falls, Oregon, serious outbreaks occurred against members gathered in the local conventions.

Little Rock, Arkansas

A NEWSPAPER report in the Arkansas Gazette of September 20th, describes the violence at Little Rock:

"Seven members of the religious cult known as Jehovah's Witnesses were injured, including two who were shot in a fierce and bloody battle at the former Brinkley Hospital last night.

"Workers of Stretch 3 of the War Emergency Pipeline attempted to drive the Witnesses from their quarters in the former hospital building. The battle started when about 100 of the pipeline workers armed with guns, sticks, black-jacks

and pipe swarmed into the hospital grounds about 8 p.m. The khaki-clad workers still covered with dust from their day's labors, met with resistance soon after they entered the gate.

"About 10 Jehovah's Witnesses blocked the road about 150 yards from the highway and the trouble started when the angered pipeliners started through. Six or seven shots were fired during the struggle which lasted five minutes. After the fight, the Witnesses fell back toward the hospital and into the woods. Meanwhile other Witnesses coming from the city in cars were attacked as they turned from the highway into the road leading from the hospital. The pipeliners at the gate ordered them from their cars or dragged them out. They were attacked and beaten over the head.

"Asked if they would salute the flag, many refused to answer. One begged for mercy and finally broke away and tried to flee. He was captured before he had gone far. A woman seated in a parked car across the highway, screamed encouragement to the attackers, as he was being pursued. A husky Little Rock youth, about 19, a spectator, turned pale as he watched the beating.

"Occasionally another automobile would turn into the grounds. A dozen or more pipe-liners pounced on each car and asked: 'Are you a Witness?' The usual answer came back in a firm voice, 'Yes I am a Witness.' The driver and male occupants were then dragged out and the pummeling began. Many used their fists, but others wielded clubs, long heavy screw drivers, and others black-jacks. The beating continued until the victim fell.

"One victim was seated on the running board of an automobile after he had been beaten, but a group of men surrounding him prevented the reporter from seeing what had happened. The spokesman demanded that the Witness salute the flag. Apparently he complied. He then was tossed into a ditch with three other prostrate forms. These four remained in the ditch when the reporter left."

The Department of Justice was urged by the Witnesses to investigate and act, but no results have yet appeared, possibly due to lack of a federal question.

Klamath Falls, Oregon

AT Klamath Falls, over 1,500 men, women and children were gathered in their convention hall. Outside, according to affidavits, a quickly growing mob, which reached 1,000 at its height, attempted to break into the meeting, and subjected many of the Witnesses to physical violence. Stones and stink-bombs were thrown in through the windows, literature was burned, property destroyed, and hundreds of automobiles belonging to the Witnesses were disabled. The local police were unable to cope with the situation. Only militia called out promptly by Governor Sprague were able to restore order.

Excerpts from an affidavit dated Sept. 24, by Edna F. Rogers of Medford, Oregon, state:

"At one o'clock when Brother Knorr came on, everyone was inside the hall ready for his speech "Peace—Can It Last." The front section or lobby where the literature was kept, had been arranged with chairs for women with children under five years. It was pretty well filled and the main hall also. Soon we heard an American Legion band outside the hall. Then we heard the American Legion had put up a bond-selling booth across the street and were yelling 'Come on out and buy bonds—why don't you help fight this war.' Then they went through a flag-salute ceremony and called on us to join them. A few minutes after that things began to happen—all of a sudden a stone came through a large plate glass window. I was sitting with the children and as the door slid open, we could see fists flying as well as clubs. Then the lecture stopped which meant the enemy had cut the wires.

"Brother Davis took the lecture just where Brother Knorr left off, and tried quieting everybody by telling them everything was alright. Soon our men returned and I could see they had been in a fight as some of their faces and hands were cut and bleeding.

"The crowd outside was getting uglier and uglier. So they were pitching, rocks, stink-bombs, and bottles containing ammonia and acid. Our men proceeded to break up

benches and as soon as a window was broken, they would place parts of the benches in the openings to keep out tear gas and stink bombs. They had to stand there with clubs made out of the benches to hit those who tried to climb through the broken windows. One of their crowd got hurt at one of the doors and our men at great risk to themselves opened the door and dragged him inside, for if they left him outside he would be trampled to death. Things were in turmoil, children crying and women in hysterics.

"Later a Marine Sergeant came inside bringing a local reporter with him. He said he'd rather fight on our side as from the looks of things the Witnesses were good clean fighters. He stayed with us until the state militia arrived. While he was inside the mob threw in a box full of burning kerosene rags. The brethren soon threw them out. Then they broke all the plate glass windows in the front, taking some literature from the shelves. The police told them that if they'd come in a second time, they'd use real bullets on them. They did have quite a pile of literature on the street already setting it on fire.

"Then the brother announced that the militia had arrived. We were permitted to leave and they had a cordon of deputies around the building and for a few blocks around.

"On reaching the parking lot, we saw more destruction. As far as we could see, every Jehovah's Witness car was overturned. And here were some of the cars with tires missing, stolen, or cut. The cars they couldn't turn over, they had rammed the engines with holes, pulling out connecting wires and distributors."

The A.C.L.U. at once urged the Department of Justice to investigate, with the result that the U.S. Attorney at Portland replied that investigation failed to disclose a ground for federal intervention. The Union posted a reward of $500 for information leading to the arrest and conviction of any members of the mob, so far without results.

Volunteer Firemen Lead Mob

AMONG hundreds of affidavits received by the American Civil Liberties Union, scores attest to the fact that local law enforcement authorities and public employees are members, and in many instances leaders of the mobs. Following is an account of an attack that took place in Imperial, Pa., on July 11, 1942, from an affidavit by V. Flandin of Pittsburgh, Pa., dated July 22.

"On Saturday, July 11, 1942, I was engaged in the act of preaching the Gospel by means of street corner magazine work. At about 8:15, the fire-siren blew three times. Then I saw five men coming toward me leading a mob. Before I knew it, they were beating me up. My shirt was torn off my back along with the magazine bag. I was pushed against a building and thrown to the ground, where I was kicked in the ribs and chest while another one twisted my leg tearing a ligament in my knee. While I was still there, Walter Moschiwsky, William Comodor, and William Torso came over to help me. By this time two hundred or more gathered beating up all of us. I managed to get on my feet and together with Walter Moschiwsky, we headed for the outskirts of town which was very difficult in view of what they did to my leg. As we went we were being kicked in the rear. On the way I saw one of the mobsters hit Joseph Vruck, 54 years old, with his glasses on knocking him to the ground. I also saw one of the men hit Charles Meng while he was sitting in his car. They dragged him from his car and beat him."

(The affidavit continues to tell how the several Witnesses attempted to get out of town in their cars. The narrative is picked up here with the affidavit of William Torso, of McKees Rock, Pa.)

"Walter Vruck rode with me out of Imperial going east on route 22-30. The mob noticed my car and they immediately jumped into their cars, and into a fire truck, with the fire chief, Frank Meacci driving. They followed us.

"As we came to Hood's tavern, I noticed Walter Moschiwsky, G. Flick, Joseph Vruck and John Leroy standing there. I pulled up to let them in my car. As they got in, the fire-

truck and the rest of the mob were on top of us. The fire-truck had their red-flashing spot-light going on and off. I wound up my windows and locked the door. The mob broke the windows with a fire axe. They opened the door and dragged me out. Vruck and Le Roy managed to get away by running into the woods. Flick ran across the lot. The mob chased him, caught him, and smashed his nose, and cut his lip, and put a lump on the side of his temple. They lined us all up and started to beat us. They grabbed Moschiwsky, put him up against a flag-pole and hit him, telling him to salute the flag. Then they took us over to the flag pole and wanted us all to salute it.

"The mobsters did not know exactly what to do with us. The final decision was, 'let's take them back to Imperial and hang them.' They then kidnapped us, loaded us on the fire-truck and started back through a side road with 15 cars following. Half-way there, the Motor Police came by, and stopped the truck and rescued us."

Efforts by the Jehovah's Witnesses to obtain prosecution of the assailants failed.

"Constitution Don't Apply Here"

AN affidavit by J. E. Lowe of Columbus, Ohio dated March 25, 1942 tells of violence that occurred in West Jefferson, Ohio on March 21.

"Previous events leading up to this will show that this mob violence had the blessing of Officer Lonnie Wolf and Mayor Stone of West Jefferson. On March 7th, Officer Wolfe took several Witnesses who were preaching the gospel on the street corners by displaying the Watchtower and Consolation magazine, to the Mayor's office. They were held there for an hour and a half without any charge being preferred against them, during which time Mayor Stone was trying to find some ordinance which he could use against them. He told them he would charge them with contributing to the delinquency of their children, keeping them out after

9 o'clock. (The Witnesses were finished with their work at 7 p.m. when apprehended.) When reminded that the Supreme Court had ruled in our favor, Wolfe replied 'We don't care for the Supreme Court and the Constitution don't apply here.'

"On March 12, another Witness and myself called at Mayor Stone's office. He ordered us out of his office and slammed the door. On March 14th, the Witnesses returned to West Jefferson. Mayor Stone said he would arrest us as soon as he could find Officer Wolfe.

"On March 21 three car-loads of Witnesses returned to West Jefferson. Officer Wolfe was seen going in and out of different places where men generally hang out in small towns. Then the town siren blew. A crowd of men gathered in front of the barber shop immediately began pushing the Witnesses and striking them. The five male members tried vainly to protect themselves and their wives and children, but were so greatly outnumbered that it was impossible. In their viciousness they hit women members and knocked them down, one of them unconscious, and blacked their eyes. They were reminded that they were fighting against Christians and taking the law into their own hands. They replied 'That's exactly what we're doing—taking the law into our own hands.'

"They started on us again. The Witnesses' faces were already bloody. Someone hit me with a blunt instrument. Everything went black. While in this condition, they continued to strike my head and face cutting another gash in the top of my head. At the same time they had dragged three of the Witnesses out on the highway and were pounding, beating and kicking them. Such shouts as 'Kill them,' 'Tar and feather them,' 'Make them salute the flag,' came from all directions. And, all this time, Officer Wolfe sat in the barber shop and watched.

'Finally this gory indescribably vicious assault ceased. The Witnesses locked arms and started to walk toward their car at the far end of town. One tall young, blond fellow procured a huge American flag, held it high over our heads

and marched with us. The same noble flag-bearer had only a few minutes ago twisted the arms of a young girl Witness behind her back until she thought they would break. The mobsters were at our heels singing 'My country tis of thee sweet land of liberty,' and shouting, 'Make them salute the flag.' "

Protests were lodged with the Department of Justice against the local law enforcement authorities, but no prosecution has been brought.

Efforts to Combat Violence

IN an effort to inspire prosecution of those participating in such attacks, the A.C.L.U. has recently offered public rewards of $500 on five different occasions; in three Texas towns, at London, Ohio, and at Klamath Falls, Oregon.

The effect of these award offers has generally been to restrain further outbreaks in the particular town. But they have not resulted in getting information against the offenders. A letter from Curtis A. Smith of London, Ohio, illustrates the reason for this: "I have obtained names of various individuals that committed this crime, and have found out the names of several eye witnesses, but they are afraid to turn over their names to you."

In numerous instances, the Witnesses and not the attackers have been arrested on one pretext or another. They have found it very difficult to retain counsel in their defense, "because of fear to represent the brethren at any price." Deprived of counsel, they have often successfully acted as their own attorneys, guided by instructions on court procedure and legal argument in pamphlets issued by their organization.

It is also their practice to send affidavits to the Civil Rights Section of the Justice Department after each instance of violence. Investigations are promptly and searchingly made but in only a few cases is a federal issue found. Even so, grand juries often refuse to indict. In only one instance has a prosecution and conviction resulted. A federal prosecutor succeeded in May 1942 in ob-

taining the conviction of two local law enforcement officers in the U.S. District Court at Charleston, West Virginia. These officers, a police chief and a deputy sheriff of Nicholas County, West Va., were found guilty of failing in 1941 to protect the civil rights of a group of Witnesses and wrongfully detaining these Witnesses in the Richwood City Hall, tying them with ropes, making them drink large quantities of castor oil, and leading them out of town at the end of a rope. An appeal from this conviction was taken to the Circuit Court of Appeals in October 1942.

The efforts of the Department of Justice, and the pronouncements of the Attorney General and his instructions to district attorneys have contributed greatly to declining violence. Some of the decline is to be attributed also to the restrictions on the mobility of propagandists by gasoline rationing.

III

The Distribution of Literature

IN two notable cases the United States Supreme Court has sustained the right of Jehovah's Witnesses, and thereby of all others, to distribute literature freely in public places, to canvass house-to-house, and to play phonograph records when objection is not made.

Cantwell v. Connecticut put these rights on firm foundations. An appeal had been taken by Newton Cantwell and his two sons from a decision of the state supreme court upholding their conviction on two charges—solicitation of funds for religious purposes without approval of the secretary of the welfare council, and playing records attacking the Catholic Church, which, it was charged, would incite others to a breach of the peace.

In reversing the conviction on both counts, the Supreme Court said in an opinion delivered by Mr. Justice Roberts on May 20, 1940, that:

> "We hold that the statute (regarding solicitation) as construed and applied to the appellants deprives them of their

liberty without due process of law in contravention of the 14th Amendment. The first Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The 14th Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

"It will be noted that the Act requires an application to the secretary of the public welfare council, who is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion is a denial of the liberty protected by the 1st Amendment and included in the liberty which is within the protection of the 14th Amendment."

Right to Play Records

IN regard to playing records, the Court said:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other under the guise of conserving desirable conditions.

"Having these considerations in mind, we note that Jesse Cantwell was upon a public street where he had the right to be, and where he had a right peacefully to impart his views to others. He requested of two pedestrians permission to play them a phonograph record. The permission was granted. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he has invaded no right or interest of the public or of the men accosted. The record played by Cantwell embodies an attack on all organized religious systems. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell.—Cantwell's conduct, considered apart from the effect of his

communication upon the hearers, did not amount to a breach of the peace.—We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no personal abuse. On the contrary we find only an effort to persuade a willing listener to buy a book, or contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

To License is to Censor

LOVELL v. City of Griffin (Georgia) was an appeal from the decision of the Court of Appeals of Georgia, upholding a conviction for violating a city ordinance prohibiting the circulation of literature of any kind without first obtaining permission from the City Manager.

In reversing this conviction, the Supreme Court said in an opinion handed down in March 1938 by Chief Justice Hughes:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. The liberty of the press became initially a right to publish without a license what formerly could be published only with one! While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

Sale of Literature

BUT these decisions, favorable as they were, did not settle the issue. For Jehovah's Witnesses not only distributed literature free but also asked for contributions to pay for its cost. Sometimes they made actual sales, withholding distribution if it was not paid for. This resulted, after the Supreme Court deci-

sion, in the passage of ordinances in many cities taxing the sales of literature in public places or in jailing Witnesses under peddling ordinances. Contests of these ordinances and arrests resulted in varying decisions, some courts refusing to recognize the claim of officials that they were peddlers, other courts sustaining that contention.

The whole issue came before the Supreme Court in cases joined from Opelika, Alabama; Fort Smith, Arkansas; and the State of Arizona. The Court decided the issue in June 1942 by a 5 to 4 decision, sustaining the right of cities to tax the sale of any literature. The majority opinion delivered by Mr. Justice Reed said:

"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press."

THE minority opinion, delivered by Chief Justice Stone, said:

"It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists are to be sustained, a way has been found for the effective suppression of freedom of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by 18th Century newspapers and pamphleteers and which were a moving cause of the revolution."

The court went even further, by implication at least, in refusing in October 1942 to review the convictions of three members of Jehovah's Witnesses for violation of a local ordinance in Florenville, Texas, prohibiting altogether the sale of literature

on the streets. The convictions had been upheld by the Texas Supreme Court. Arrangements are being made by counsel for Jehovah's Witnesses to bring the cases again before the Supreme Court.

Petition for Rehearing

AN effort is also being made to get the Court to re-hear the case decided in June by a majority of one. The application for a re-hearing was supported not only by the American Civil Liberties Union, which appeared in the original case, but by the American Newspaper Publishers Association and the Seventh Day Adventists.

In the application for a rehearing the brief for the Jehovah's Witnesses, signed by Hayden Covington, said:

"The majority Supreme Court opinion says: 'So the mind and spirit of men remain forever free, while his actions rest subject to necessary accommodation to the competing need of his fellows.' This is a new theory grafted on to the Constitution and the law. According to precedent, the only time acts involving freedom of conscience are subject to restriction is when the act presents a clear and present danger to the nation and to the property rights of others; or is contrary to morals, or that public peace will be invaded.

" 'The mind and spirit of man remain forever free' says the Court. But he still needs a license! His mind and spirit are free so long as he sits on a porch, or is sound asleep in bed. If his mind and spirit move him to get up and go somewhere in the interest of others, there freedom ends and he must have a license. The Court has ruled that if you don't use your mind, none may interfere with you. If you do, they may.

"The fee 'for use of the public streets for business purposes' is proper for use beyond the common right. But it has no valid bearing on the common right or use, more especially free speech, free press, and worship of Almighty God.

"Under guise of securing public order, decorum and free movement of traffic, public expression is suppressed. Taxed

speech is not free speech. It is silence for persons unable to pay the tax. Nor is taxed distribution of literature a free press. Nor is taxed dissemination of Bible literature freedom of worship."

Entire Press Endangered

THE brief of the American Newspaper Publishers Association signed by Elisha Hanson saw in the court's decision an attack against freedom of all the press and said:

"The hazards to which the press may be exposed as a result of upholding of the license taxes in the instant cases are readily perceived. If the legislature can require a license as a condition precedent to the circulation of press information, it can impose an identical license as a condition to engaging in the newspaper publishing business.—If the state has such power, it may make the conditions of the license whatever it wills, to the extent for instance that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform the functions at all."

Threat to Speech, Press, Religion

THE brief for the American Civil Liberties Union signed by Osmond K. Fraenkel charged that the "decision of the majority has greatly curtailed the constitutional protection of freedom of speech, of the press and of religion." The brief continued:

"That the decision of the Court will have far reaching and disastrous consequences can hardly be denied. While the amounts of the taxes were not challenged in the particular cases before the court, in the belief that no such challenge was necessary in view of the nature of the ordinances, it can hardly be denied that the amounts are substantial and burdensome. If the opinion of the court stands, then all unpopular minority groups will be confronted with the necessity of challenging, in each instance, the reasonableness of the amount of the license fee exacted by each particular municipality. Until a number of such cases shall have

reached the Court no one will know what standard will be applied. The litigation which will ensue will necessarily create a tremendous burden on all such groups. It may indeed by itself result in a practical denial of freedom of distribution.

"It is evident that ordinances of this kind lend themselves to discrimination in enforcement. So long as they are confined to purely commercial enterprises, there is little likelihood of discrimination—or at least it can be taken care of in ordinary ways. However, when such licenses can be imposed on persons exercising political or religious functions, then it is practically certain that such discrimination will result, that unpopular groups will be harrassed for not having paid the tax and popular ones never required to pay it. The burden will then be imposed upon the representatives of these unpopular groups to prove this discrimination, a burden difficult to sustain.

"Finally, the decision rendered opens wide the door to the harrassing of unpopular groups by dubious testimony. If these groups now abandon their previous habit of requesting contributions in connection with distribution of literature, it is safe to predict that their representatives will be arrested throughout the country on the charge that they did request such a contribution. In the vital field of freedom of ideas, no such consequence should be possible."

Missionary Method Jeopardized

A RELIGIOUS denomination affected directly by the court's decision, is the Seventh-Day Adventists whose system of proselytizing through literature distributors known as "colporteur evangelists" is very similar to that employed by the Jehovah's Witnesses. A brief filed for this denomination by Homer Cummings, former U.S. Attorney General said:

"It is not too much to say that the cumulative result may be the ultimate destruction of the Denomination; and it must necessarily curb drastically the missionary method it has

developed in the United States without official hindrance for a century.

"The colporteur system is a religious rite, a method of carrying the Gospel to otherwise inaccessible places. Yet the court by its decision denies the right to spread the Gospel except to those of substance. The denial of the only practical method to carry on this religious work is a denial of the right itself."

The Press in Opposition

THE reaction of the press to the court's decision was one of widespread opposition. Such national magazines as Colliers, Newsweek, and Time were among those expressing dissatisfaction. No less outspoken were the daily newspapers, among them, the New York Times, New York Daily News, New York Post, Chicago Tribune, Chicago Daily News, Washington Post, St. Louis Post Dispatch, Detroit News, Atlanta Journal, Lexington Leader, and Richmond Times-Dispatch.

Even the religious journals, organs of denominations which the Jehovah's Witnesses have continuously berated, came out in protest. Included among them were, the Tablet (New York, Catholic), the Commonweal (New York, Catholic), Presbyterian Guardian (Phila.), Watchman Examiner (New York, Baptist), Christian Advocate (Chicago, Methodist), Christian Century (Chicago, undenominational).

IV

The Court Cases Against Them

Sedition and Other Offenses

JEHOVAH'S WITNESSES have had to meet in the courts all over the country a host of charges ranging from vagrancy to sedition. While convictions have been obtained in the lower courts, no higher court has yet sustained any conviction for car-

rying on the organization's activities. Yet scores of Jehovah's Witnesses have been obliged, while the higher courts were deliberating, to serve short sentences in prison.

Early in 1942, the Mississippi legislature passed a law penalizing "doctrines and teachings detrimental to the public safety," and making it an offense punishable by confinement to the penitentiary for the duration of the war to "encourage by speech or in print disloyalty to the government, or to create an attitude of refusal to salute the flag."

Scores of arrests have already been made under this law. The first test case was argued in the Lee County Circuit Court of Mississippi in May 1942. The defendants, Otto Mills and his wife Roxie, were convicted for distributing a booklet written by the late Judge Rutherford setting forth the reasons why Jehovah's Witnesses cannot salute the flag.

Building Up Prejudice

AN examination of the testimony in this case reveals that the jury convicted the defendants not for distributing seditious literature under the indictment, but for their refusal to salute the flag and fight for their country. Excerpts from the examination of Mills by the prosecuting attorney Coleman:

Q. Mr. Mills, you said a while ago that you would not take up arms in defense of your country, neither would you salute the American flag, is that correct?

A. Yes, sir.

Q. Mr. Mills, suppose the United States Army was coming down the streets of Tupelo, to defend your home, and you were standing on the sidewalk when the American Flag passed, you tell this court that you would not honor that flag to the extent of saluting it?

A. I would not.

Q. You have been teaching others not to salute the flag, haven't you?

A. I have not.

Q. Now your counsel asked you what your position was in this war, and you say you are neutral.

A. That's right.

Q. You mean you are going to stay here and are going to get all the advantages the Government gives you, but you want the other man to do your fighting—then you are just not a fighting man when it comes to defending your home, or your wife, or your baby or your country?

A. If the American people took the stand I am taking, they would not have to fight. Jehovah God would do your fighting.—I can give you instances from the Bible where the Lord God Jehovah fought for the children of Israel and the people did not have to hit a lick in their own defense.

Q. Those were miracles God performed.

A. God can still perform miracles.

Q. Yes but He don't do it very much.

An appeal from the conviction is pending before the Mississippi Supreme Court. The American Civil Liberties Union filed a brief as friend of the court charging that the statute denied freedom of worship, speech and press and that the conviction was the result of prejudice against the defendants' religious views.

Louisiana followed by adopting a law similar to the Mississippi law. No test case under it has yet been reported.

Criminal Syndicalism, Riotous Conspiracy

CRIMINAL syndicalism, a charge designed for radicals, was the basis for indictment of seventy-five Jehovah's Witnesses at Connersville, Indiana in 1941. The prosecution considered it advocacy of the overthrow of the existing government to preach "Theocratic Government by Jehovah," a basic belief of the association. The Fayette County circuit court, though as yet refusing to act on a motion to dismiss the charges, released bail for the defendants and the case is therefore virtually dead.

In the same town, a year earlier, two women, one aged seventy and the other over fifty were tried for riotous conspiracy. They

were found guilty and sentenced to two to ten years in Indiana State Prison. Although an appeal was taken, the women were not released on bond until several months later. The state supreme court finally reversed the conviction and freed the defendants.

In Harlan County, Kentucky, in June 1940, six members of the Jehovah's Witnesses were arrested under the state sedition act on the ground that they advocated another form of government, "theocracy." They were held in jail for weeks, being finally released when their counsel applied for an injunction before a three-judge federal court to prevent the trial. The court ordered the Witnesses freed and advised the state's attorney to notify prosecutors throughout the state not to invoke the sedition statute against members of the association. The order, in the form of an injunction, also prohibited intimidation or threat against Witnesses.

In general, the rights of Jehovah's Witnesses have been sustained against prosecutions when appeal has been taken either to the higher courts or to the federal courts. The lower courts—both officials and juries—reflect current prejudice too strongly to do justice. Only determined and organized resistance by Jehovah's Witnesses and the skill with which they conduct their litigation, have secured the degree of freedom they enjoy.

V

Flag Saluting in the Public Schools

OF all the activities of Jehovah's Witnesses to attract public attention, and the first to raise the issue in the courts, was the refusal of school children to salute the flag. Their refusal has been handled by sharply differing tactics. In the larger communities the issue has hardly arisen because school officials commonly permit the children of Jehovah's Witnesses to remain sitting, or to stand silently while the rest of the children go through the patriotic exercises; or they are excused altogether from attendance at them.

But in the smaller communities, where pressures for conformity are stronger, most school boards have responded by expelling

the children altogether. Parents then made provision for private instruction; or where numerous expulsions occurred, Jehovah's Witnesses organized special schools of their own. In some states, expulsions were followed up by prosecutions of parents for refusing to send their children to school or for contributing to their delinquency. In a few states children themselves were haled to court as delinquents, and ordered to state training schools. All these prosecutions have so far failed to stick on appeal, with the sole exception of the Supreme Court of Arizona which recently sustained a conviction of parents. A review by the U.S. Supreme Court is being sought.

The New Jersey Supreme Court last June ruled that parents cannot be penalized if their children are expelled from school for not saluting the flag out of religious reasons, and set aside the fines imposed on parents of expelled children.

In Massachusetts the State Supreme Court in August 1941 reversed the decision of a lower court which upheld the commitment to reform school of three children as "habitual school offenders." The children were first expelled by the school authorities for refusal to salute the flag, and then charged with being "offenders" because of their enforced absence.

The New Hampshire Supreme Court in May 1941 voided reform school sentences imposed on children who were charged with "delinquency" after being expelled from school for refusal to salute the flag. In scouting the charge of "delinquency," the court held that the exercise of religious scruples by the children "is not tinged with immorality or marked by damage to the rights of others."

The ACLU filed briefs as friend of the court in most of the flag salute cases.

It is estimated that several thousand children have been expelled in the last five years and have been forced to receive very inferior instruction for the sake of conscience.

Supreme Court Decision

THE flag saluting issue which arose in so many communities was finally carried to the United States Supreme Court, which in June 1940 rendered a decision in the case of *Minersville*

v. Gobitis with Justice Harlan F. Stone alone dissenting, sustaining the right of school boards to require flag saluting as a condition of school attendance. The effect of the decision was not only to confirm the expulsions but greatly to extend them.

Thus the issue remained settled, as everybody thought, until June 1942 when an unprecedented postscript was added to the decision in the literature sales tax case (*Opelika*) by three of the judges who "confessed error." They said:

> "The opinion of the court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practised by a minority group. This is but another step in the direction which *Minersville v. Gobitis* took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the Gobitis case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The first amendment does not put the right freely to exercise religion in a subordinate position. We fear however that the opinions in this and in the Gobitis case do exactly that."

Congress Acts

AT almost the same time Congress passed an act sponsored by the American Legion regarding the use of and respect due the flag, in which it was provided that *full respect for the flag may be shown by civilians when the pledge is given by merely standing at attention.*

An interpretation issued in July 1942, by the Civil Rights Section of the Justice Department said that this law "lays down a Federal standard with regard to a matter which is primarily a concern of the national government and there is therefore a very real question whether any local regulation, ordinance or statute prescribing a different measure of respect to the flag can be en-

forced: for example, flag salute regulations of local school boards such as the Supreme Court upheld in *Minersville v. Gobitis.*"

U.S. Attorneys were instructed to bring this law to the attention of local authorities, requesting the authorities to "conform their policies to the Congressional standards."

Refuse to Follow Supreme Court

TAKING a cue from the "confession of error" of the Supreme Court judges, a three-judge District Court in West Virginia in October 1942 voided a state law requiring the flag salute, saying:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not.—The developments with regard to the *Gobitis* case however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present chief justice in his dissenting opinion therein and three other justices in a dissenting opinion in *Jones v. City of Opelika.*

"Under such circumstances, and believing as we do that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

Shortly thereafter, the state announced its intention of appealing this decision to the U.S. Supreme Court, which will thus be faced with the reconsideration of its decision in the *Gobitis* case.

The Kansas Supreme Court alone among the state courts has voided a flag-salute statute. In doing so the Court said in July 1942:

"The general theory of our educational system is that every child in the state without regard to race, creed or wealth, shall have the facilities for a free education. In the 34 years since the (school) statute was enacted, no school board, county or state superintendent of public instruction ever acted on the theory that failure of the child to salute the flag, where such failure was based on sincere religious beliefs of the child or his parents would require or justify the expelling of the child from school. We think the statute was never designed to be so construed, and if so, to that extent would be void as being in violation of Section 7 of our (state) Bill of Rights.

"We are not impressed with the suggestion that the religious beliefs of the appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable or unreasonable depending upon who is speaking. It is enough to know that in fact their beliefs are sincerely religious, and that is conceded by appellee. Their beliefs are formed from the study of the Bible and are not of a kind which prevent them from being good, industrious, home-loving, law-abiding citizens."

The result of the long litigation shows conclusively that no criminal penalties will be maintained against parents or children for refusing to salute the flag. Expulsion from school is the only penalty; and even that the courts are beginning to hold void. It is conceivable that the U.S. Supreme Court in the pending case will reverse its position upholding the right to expel—and that thus, the common sense practice of tolerance prevalent in the larger school systems will be constitutionally guaranteed everywhere.

VI

Military Service

JEHOVAH'S WITNESSES do not regard themselves as pacifists or as conscientious objectors to all war. They would fight for Jehovah. They take the position that "their personal covenant to carry out Jehovah's work of witnessing at this time precludes

them from taking up carnal weapons." They commonly regard themselves rather as ministers whose work forbids them to engage in military service, and they demand exemption from all requirements, the same as others claiming to be ministers of God.

The fact that they are not ministers in the accepted sense, following a full-time occupation for which compensation is paid, has made the adjustment of their claims difficult. An agreement was reached between members of Jehovah's Witnesses and Selective Service by which persons qualified by the Witnesses as full-time servants and listed with Selective Service would be given the status of ministers. But the great majority of Jehovah's Witnesses are not full-time servants and earn their livings in other ways. Yet they have commonly demanded the same exemption. Local boards may so recognize them, if they will, but few have done so.

The result, therefore, is that Jehovah's Witnesses not on the list of full-time servants and yet claiming to be ministers have been classified variously by local boards, either for active military service, non-combatant service or as conscientious objectors. Recently the furnishing of lists of full-time servants has been dropped and discretion left wholly to the local draft boards.

The Witnesses commonly reject any form of compulsory service even in a civilian camp for conscientious objectors. When notice of induction comes, a large number of them have refused to respond and are therefore prosecuted. Over four hundred and fifty were in prison by November, 1942 serving sentences up to five years—by far the greatest number of any one religious organization to be sentenced.

In prison most of them have refused to accept paroles to conscientious objector camps. Only about 100 of them have done so. Suggestions are being considered for solving the impasse by getting them out of prison and into useful work in prison camps similar to the work done in Civilian Public Service Camps.

VII

Expulsion from Jobs

SHORTLY after the declaration of war by the United States, instances were reported of expulsions from their jobs of Jehovah's Witnesses for refusal to salute the flag. The following

four typical expulsions took place in one month—December 1941.

Seven Jehovah's Witnesses were dismissed by the Pittsburgh Plate Glass Co. in West Va., five of them having worked there for 5 to 18 years. All were members of the Window Glass Cutters League, AFL, which has a closed shop contract with the firm. This organization at a business meeting defeated a resolution that "we are not willing to work with any persons refusing to salute the Stars and Stripes." However, CIO truckers refused to cart glass. The firm fired the seven in order "not to interfere with production." In November 1942, they were ordered reinstated with full seniority by the Fair Employment Practice Committee and the unions were ordered to control their members against molesting the reinstated men. The case was brought to the attention of the F.E.P.C. by the A.C.L.U.

A postal clerk in Turlock, California was dismissed after complaints from American Legionnaires against his refusal to salute the flag. The Legionnaires wrote to Congressman Bertrand Gerhart of California demanding his dismissal, and complained to postal authorities that they did not want to be served by a postal clerk to whose doctrines they objected and who was obtaining his livelihood from a government whose flag he refused to salute. All efforts to secure his reinstatement have been unsuccessful.

Two employees of the Hatfield Wire and Cable Co., Hillside, N. J., were dismissed because other employees said they would not work if the Jehovah's Witnesses stayed on the job. This action was approved by the plant organization of the United Electrical Radio and Machine Workers of America (District 4, CIO).

One employee was dismissed by S. W. Gas and Electric Co. at Shreveport, La. He was a member of Local 329, International Brotherhood of Electrical Workers.

In one case, there was no dismissal by the employer, but mob action by employees prevented Jehovah's Witnesses from coming to work. Since they were still on the payroll, and had "willingly absented themselves" from work, they were denied unemployment insurance benefits. Their troubles are set forth in the affidavit of Betty Kaspar and Edna Appar of Hammond, Indiana, July 28, 1942:

> "On Friday, July 24, there was a flag ceremony in the Salvage Dept. at which we were not present, because we

were called to the Assistant Sup. office for no other reason than to keep us away from the ceremony to avoid any trouble. We planned to be present at the ceremony and stand in respect of the flag as it stands as an emblem of freedom and justice for all. At quitting time of the same day a mob of 50 women asembled to 'kick us out.' We managed to stay in the plant for our own protection but had to call the Indiana Harbor police to get us home safely. The workers have since then formed a picket line every morning to prevent us from returning to work, with the threat of tearing our clothes and rendering a beating."

How many such cases there are is difficult to say for most are unreported. It is encouraging that the F.E.P.C. has taken jurisdiction in one case and for the first time in history put the power of the federal government against discrimination in employment because of religious prejudice.

VIII

How to Help

ALL friends of civil liberty can assist in combatting attacks on the rights of Jehovah's Witnesses as follows:

1. In cases of threatened expulsion from school for refusal to salute the flag, write or see school officials or members of Boards of Education, and call attention to the national flag salute law and the opinion of the Department of Justice. Seek to effect that reasonable settlement of the conflict.

2. In cases of mob or personal violence, write or see the local prosecuting officials; if that seems hopeless, and a federal question is involved by the participation of local officials or their failure to act, write the Civil Rights Section of the Department of Justice, Washington, D.C., or the local U.S. Attorney.

3. In cases of interference with the free distribution of literature on the streets or house to house, write or see the police officials or sheriff calling attention to the constitutional right to distribute literature free. If it is sold or contributions are asked,

and arrests are made under a licensing law, urge the repeal of the law as bad policy when applied to non-commercial matter, and as discriminatory if applied only to the Witnesses—for the sale of newspapers is not commonly licensed.

4. In cases of dismissals from employment for prejudice, write or see the employer or the union officials concerned.

5. In all cases, send letters of comment to local newspapers—to be published signed or unsigned—in order to help combat intolerance. Urge editors to comment.

Much can be done by local effort, even by individual citizens, to establish tolerance in these matters. Assistance can also be rendered by the national office of the A.C.L.U. to which clippings, information and copies of protests should be sent, to be reinforced by action from the national office.

Only vigorous action on the part of public and private agencies will succeed in overcoming the added war-time intolerances to Jehovah's Witnesses, and help maintain those liberties of speech, press and conscience so essential to us all in a democracy.